No. 312. 72

By Looney for 2068

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 312. 72

JOHN M. AVERY, CHARLES C. COBB, AND H. I. PHILLIPS, PLAINTIFFS IN ERROR,

vs.

I. POPPER & BRO. AND R. R. NEYLAND ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

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Attorney for Defendants in Error,
I. Popper & Bro. and R. R. Neyland.

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IN THE

Supreme Court of the United States.

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JOHN M. AVERY, CHARLES C. COBB, AND H. I. PHILLIPS, PLAINTIFFS IN ERROR,

vs.

I. POPPER & BRO. AND R. R. NEYLAND ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR DEFENDANTS IN ERROR.

ABSTRACT OR STATEMENT OF THE CASE.

The defendants in error respectfully beg leave to present the following as a correct abstract or statement of the case, presenting the questions involved and the manner in which they arose:

On June 29, 1893, I. Popper & Bro. brought a suit in the district court of Hunt county, Texas, against J. H. and M. E. Cooke, W. W. Avery, and John M. Avery to recover of J. H.

and M. E. Cooke the sum of $775, with interest, upon the note hereinafter described, and to foreclose as against all the defendants a mortgage lien on the property hereinafter described. On the same day R. R. Neyland & Co., a firm composed of R. R. Neyland, brought a separate suit against the same parties to recover the balance due on said note, after deducting the amount for which I. Popper & Bro. sued, and likewise to foreclose said mortgage.

In each suit a writ of sequestration was sued out under the statute of Texas against W. W. and J. M. Avery, the property then being in the possession of J. M. Avery, and after its seizure by the sheriff of Hunt county under the writs of sequestration, was replevied by J. M. Avery, he giving sureties upon his replevy bond the defendants in error Charles C. Cobb and H. I. Phillips.

On the 16th day of January, 1894, motions were made in each case by the defendant John M. Avery to quash the sequestration proceedings. These motions were overruled, and on the same day, on application of the plaintiffs, the defendants in error herein, the two cases were consolidated. None of the defendants except J. M. Avery filed answers. After the cases were consolidated the plaintiffs filed an amended petition, in which, in addition to the matters plead in their several petitions in the original suits, they alleged the issuance and levy of the writs of sequestration, the replevy of the property by J. M. Avery, and that afterwards Avery had moved the property out of Hunt county and converted it to his own use; that they claimed a mortgage lien upon the property in controversy, and in case the court should hold that the mortgage did not cover any specific stock, they claim the right to elect, and did elect, to claim the property involved herein. In the amended pleadings after the consolidation, W. W. Avery was not continued as a party to the suit.

The defendant J. M. Avery, in his answer to the merits, alleged the purchase of the property under an execution

issued from the circuit court of the United States at Dallas by virtue of a judgment there rendered in favor of W. W. Avery against J. H. Cooke and other parties not necessary here to be mentioned. He claimed further that the mortgage sought to be foreclosed was void for want of sufficient description of the property, in that at the time it was given J. H. and M. E. Cooke had a great many more similar stock which were kept mingled with the stock mortgaged. He further claimed that the mortgage covered a great many more stock and horses besides those seized and purchased by him under execution and sequestered in the consolidation suits; and he prayed that the mortgage be foreclosed on all the stock, and that the other stock be sold first. In other words, he invoked the doctrine of the marshaling of assets. He also plead that the mortgage was fraudulent and void because at the time it was given J. H. Cooke was insolvent and had ever since remained so, and it was with the knowledge and consent of the mortgagee and plaintiffs that Cooke had sold some of the mortgaged property and appropriated the proceeds to his own use.

In a supplemental petition the plaintiffs alleged that the property mortgaged to secure the note was the separate property of Mrs. M. E. Cooke, the wife of J. H. Cooke, and that the plaintiffs in error had no right to invoke the doctrine of the marshaling of assets. The plaintiffs in error have stated the character and amount of judgment rendered in the respective courts, which I will not repeat.

On an appeal by the plaintiffs in error from the judgment of the district court of Hunt county, the defendants in error herein, under the rules promulgated by the supreme court of Texas, filed cross-assignments of error, all of which were sustained except the fourth, which will hereafter be treated in this brief.

Under the laws of Texas the findings of fact made by the court of civil appeals are conclusive. I therefore give

below their findings in full as a part of the statement of this case.

The Findings of Fact Made by the Honorable Court of Civil Appeals in this Case.

On May 26, 1891, J. H. Cooke and his wife, M. E. Cooke, executed and delivered to T. H. King their joint and several promissory note for $1,940, payable on the 1st day of November thereafter, with interest from January 1, 1891, at the rate of 12 per cent. per annum. The note provided for 10 per cent. attorney's fees, if placed in the hands of an attorney for collection.

On the 10th day of April, 1892, the payee, T. H. King, transferred without recourse to I. Popper & Bro. an interest of $775 in said note, with interest thereon at the rate expressed in the note from its date. At the same time said payee transferred without recourse the balance of said note, principal and interest, to R. R. Neyland, under the firm name of R. R. Neyland & Co.

To secure the payment of said note, the makers thereof, on May 26, 1891, executed and delivered to T. H. King their chattel mortgage, whereby they conveyed to him, among other property, 50 cows, with their spring calves (spring of 1891); cows branded Cooke on the left side and O. K. on left hip, and the calves at the time were not branded (but the mortgage provided that they should be branded in the same brands as the cows); also one bay mare colt, one bay horse colt, and one black mule colt. This instrument was filed and duly registered as a chattel mortgage in the chattel-mortgage register of Hunt county, Texas, in which the mortgagors reside and the property was situated, on May 30, 1891.

On June 14, 1893, the United States marshal, by virtue of an execution issued on June 9, 1893, out of the United States circuit court at Dallas on a judgment therein rendered in

favor of W. W. Avery and against J. H. Cooke and sureties on his sequestration bond, but not against his wife, said sureties being O. Hail, William Hodges, and J. M. Johnston, levied upon the property above described.

The levy was made in Hunt county by direction of J. M. Avery, the attorney of W. W. Avery. All of said property was on June 28, 1893, by virtue of said execution sold by the United States marshal in Hunt county, Texas, at public outcry, and was bid in by J. M. Avery in the name of W. W. Avery, the amount of the bid being credited upon the execution, and all of the property was then delivered by the marshal to J. M. Avery, the attorney of W. W. Avery.

On June 29, 1893, I. Popper & Bro. and R. R. Neyland & Co. filed separate suits against J. H. and M. E. Cooke and W. W. and J. M. Avery to recover of the makers of the note above described the amount respectively due them by reason of the transfer of said note by the payee, and to foreclose the mortgage given to secure the note upon the property above described. The property was then seized while in possession of J. M. Avery by virtue of writs of sequestration issued in these suits. After such seizure J. M. Avery replevied and resumed possession of the property, Charles C. Cobb and H. I. Phillips being the sureties on his replevy bond.

After J. M. Avery replevied the property he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below, and would have been wholly unable to produce said property or any part thereof in satisfaction or partial satisfaction of the judgment rendered in said court.

At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given, but the evidence is sufficient to show that just prior to the execution of the mortgage the animals embraced in it were

pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered in the mortgage were not separated from the others of the same description with which they were mingled; nor was there such separation when the execution in favor of Avery was levied upon the property in controversy.

The evidence is reasonably sufficient to show that the 50 head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mrs. M. E. Cooke at the time the mortgage was executed and continued to be her separate property until disposed of by Mr. Avery. The 50 calves were calved during the marriage of J. H. Cooke and wife, after the cows became the separate property of Mrs. M. E. Cooke, and were therefore, when the mortgage was given and the execution in favor of Avery levied, the community property of J. H. and M. E. Cooke. The horses and mules involved in this suit were the offspring of the separate property of M. E. Cooke during her marriage with J. H. Cooke, and were likewise the community property of J. H. Cooke and wife at the time the mortgage was given and the writ of execution in favor of Avery levied upon the same.

From the view we take of the case, which will be shown in our conclusions of law, we do not deem it necessary to pass upon the question as to whether or not the deed of trust made on the 15th day of November, 1889, by J. H. Cooke to J. E. Steger, through which Mrs. M. E. Cooke claims the property mortgaged to secure the debt sued on, was fraudulent. But if we deemed the question essential to a proper disposition of this case, we should find that the testimony is reasonably sufficient to show that such deed of trust was made by J. H. Cooke for the purpose of securing his creditors, among whom was his wife, M. E. Cooke, and that the value of the property did not exceed the indebtedness it was transferred to secure.

The finding of the trial court, which is sustained by the

evidence, as to the value of the property in controversy is as follows: Cows, $13 per head; horses, $50 per head; mules, $75 per head; seventeen two-year-old past steers, $12 per head, and thirty-three two-year-old past heifers, $10 per head, aggregating $1,384. Excluding the property sequestered, upon which the mortgage is sought to be foreclosed, the remainder of the property covered by the King mortgage was, in June or July, 1893, worth $700. Since that time some of the stock not sequestered have died and some strayed, so that those left on hand when the suit was tried in the court below did not exceed in value the sum of $200. When the suits, which were consolidated, were instituted the appellant J. M. Avery resided in Dallas county and has since resided in that county continuously ever since that time. The evidence is not sufficient to show that the mortgage given to secure the note sued on was fraudulent, or that the property exceeded in value the debt it was mortgaged to secure.

The pleadings of the parties are shown on pages 1 to 11, inclusive, of the record. The conclusions of fact made by the court of civil appeals are found on pages 55 to 57 of the record.

The defendants in error submit the following counter-proposition in answer to "first preliminary proposition" of plaintiffs in error.

There is no question raised in this case for the jurisdiction of this court, as the final judgment of the supreme court of the State of Texas did not draw in question the validity of a statute of or an authority exercised under the United States, and there was no decision by said court against any title, right, privilege, or immunity set up or claimed by plaintiffs in error under any statute or authority under the United States.

AUTHORITIES.

Day *vs.* Gallup, 69th U. S., 279.
Buck *vs.* Colbath, 70th U. S., 334; 129th U. S., 506.

ARGUMENT.

We submit that the cases cited by plaintiffs in error to sustain the jurisdiction of this court fall short of accomplishing that purpose. The case of Clement *vs.* Berry, 11th Howard, 412, was where the marshal of the United States district court for middle Tennessee was sued in the circuit court of the State in replevin to recover property levied upon, and the sale was stopped by injunction issued from the State court. In that case the officer was a party defendant to the suit, and justified under the writ issued from the Federal court.

In the case of Buck *vs.* Colbath, 70th U. S., 334, Buck, as United States marshal for the district of Minnesota, levied a writ of attachment upon certain goods claimed by Colbath, who sued the marshal in trespass for their value. This court held that it had jurisdiction under the twenty-fifth section of the judiciary act, the defendant claiming the protection of an authority exercised under the United States, and the decision of the State court was against the protection thus claimed, or, in other words, against the validity of that authority as a protection to him in that action. The court will observe, however, that in that opinion the doctrine contended for by the defendants in error herein is reaffirmed. The court says:

"It is only while the property is in the possession of the court, either actually or constructively, that the court is bound to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property depends upon principles familiar to the law, but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and

discreditable collisions. It is upon this ground that the court in Day *vs.* Gallup held that this court had no jurisdiction of that case. The property attached had been sold and the attachment suit ended when the attaching officer and his assistants were sued, and we held that such a suit in the State court commenced after the proceedings in the Federal court had been concluded, raised no question for the jurisdiction of this court."

The case of Stanley *vs.* Schwalby, 162 U. S., 255, was where defendant in error brought an action of trespass to try title under Texas statutes for land claimed by the United States and occupied by officers of the United States Army, and on question of jurisdiction this court said:

"The decision of the court of civil appeals that the United States had notice of the deed of McMillan, and therefore had no title in the land, and judgment should be rendered against their officers for both title and possession, was a decision in matter of law against the validity of the authority set up by those officers under the United States, and as such was reviewable by this court, and being erroneous, must be reversed."

The case of Etherridge *vs.* Sperry, 139 U. S., 266, was where plaintiff in error, a deputy United States marshal of Iowa, levied a writ of attachment on property upon which the defendants in error held a mortgage, and after the property was sold the officer was sued in State court for its value. The court held that it had jurisdiction in this case, citing Buck *vs.* Colbath, above referred to, as authority.

In the case of Pittsburg, &c., Railroad *vs.* Long Island, &c., Co., 172 U. S., 493, jurisdiction of this court was sustained because it was claimed that the State court of Ohio refused to give effect to the judgment of a court of the United States rendered upon the point in dispute, having jurisdiction of the subject-matter and of the parties. The right or title there claimed was under an authority exercised under the

United States, and the decision of the State court was against the title or right so set up.

In Colliers *vs.* Stanborough, 6th Howard, 20 and 21, jurisdiction of this court was maintained on the ground of an authority exercised under the United States, which the judgment of the State court drew in question, and decided against its validity. This court said:

"The supreme court of Louisiana declared in its opinion found in the record, and preceding the judgment, that a creditor residing in another State cannot issue an execution upon the judgment which he has obtained in the Federal court against the executor or administrator of an estate which is admitted in the probate court as insolvent and take the property out of the hands of such executor or administrator and leave nothing for the creditors."

In Bock *vs.* Perkins, 139 U. S., 628, a marshal and his deputies were sued in the State court in trespass for levying writs of attachment sued out in Federal court. This court, following its former decisions, maintained its jurisdiction on the ground that the marshal, being sued in trespass in a State court for taking property under a writ of attachment to him directed, defends upon the ground that the property attached belonged to the defendant therein named, and presents a case arising under the laws of the United States. It will thus be seen that in these cases the officers levying the writs were parties defendant, and justified or defended under the authority of the process, or that they were cases in which the validity or legal effect of the judgments of the United States courts were called in question and denied by the State court.

The case of Hurst *vs.* Cobb and Avery, 61st Fed. Rep., 1, will hardly be considered of controlling effect in this court, especially as it seems to ignore the doctrine heretofore announced in Day *vs.* Gallup, Buck *vs.* Colbath, and 129 U. S., 506.

I respectfully submit that the doctrine announced by this

court in the case of Day *vs.* Gallup, 69 U. S., 279, is decisive of the correctness of my proposition, and that no question arises in this case for the jurisdiction of this court. Derby and Day sued Griggs in the Federal court and had the marshal to levy upon a stock of goods formerly owned by Griggs, but transferred by him to one Gallup. Plaintiffs obtained judgment against Griggs and had the property sold in satisfaction of their judgment. After this Gallup sued Derby and Day and the marshal in action of trespass for the value of the property levied upon. The suit was dismissed as to the marshal, and on trial plaintiff obtained judgment against Derby and Day for the value of property levied upon by the officer. This judgment was affirmed by the supreme court of Minnesota, and the case came to this court on writ of error. On motion to dismiss for want of jurisdiction the court held as follows:

"In no part of the record does it appear that the authority of Gere, the marshal, to take the goods was drawn in question; nor is it to be inferred from any pleading by the defendant. The facts are that from the return of the execution satisfied the Federal court had no control over the parties. The case between the plaintiffs in error against Griggs had been decided, the money made on execution, and the debt paid."

The court held that under the provisions of the act of September 24, 1789, chap. 20, it had no jurisdiction of the case.

The case reported in the 129 U. S., 506, was where an assignee in bankruptcy by virtue of his title to property as such sued to recover property alleged by him to have been transferred by the bankrupt in fraud of his creditors. The assignee gained the suit in the State courts of Tennessee, and it was brought to this court on writ of error. The court held that no question was raised in the State court as to the power of the assignee under the acts of Congress on the rights vested in him as assignee. That the proceedings were

governed and the judgment of the court upon the validity of the conveyances were subject to review in the same manner and to the same extent as proceedings of a similar character by a creditor to set aside conveyances in fraud of his rights by a debtor. In the proceedings in the State court no question arose under the action of the State court which could bring its decision within the provisions of section 709 of the Revised Statutes.

Counter-proposition in Answer to Plaintiffs in Error's "Second and Third Preliminary Propositions."

It is a sufficient answer to the propositions second and third, made by plaintiffs in error, to state that the supreme court of Texas had in former cases definitely settled the right of a mortgagee to select or elect when his lien was upon a certain number of a greater quantity or number, and this certainly would be the case as between the parties and those claiming as purchasers in execution, as in this case.

AUTHORITIES.

23 Texas, 46.
77 Texas, 468.
91 Texas, 124.

The court said in case reported in the 23 Texas that—

"A grant by the owner of a certain number of acres in a particular tract would confer a right of election upon the grantee, and authorizes him to locate the quantity in any part of the tract he saw proper to elect upon the principle that a convention must be held to pass some interest, if such effect may be given to it consistently with the rules of law, and that if it is uncertain and ambiguous, it must be construed more strongly against the grantor."

Case in 77 Texas, 468, the supreme court said:

"It does not follow that because the deed of trust fails to convey any specific cattle that no rights were acquired

under it. Conceding that the herd contained a greater number of each description of cattle than was conveyed it does not follow that the contract was a nullity and conveyed no right to the vendees.

"As between the vendor and vendees it was proper for the contract to be subsequently executed by the selection and designation of sixty-five head of cattle."

It is conceded by the plaintiffs in error that the case of Oxsheer *vs.* Watt, 91 Texas, 124, decided in favor of the right of the mortgagee to elect and select the number mentioned in the mortgage from a greater number with which they were mingled.

Counter-proposition under First and Second Assignments of Error.

Should this court, however, hold that a question is presented for its jurisdiction, then I submit the following counter-proposition in answer to the propositions of law urged by the plaintiffs in error under their first and second assignments of error:

The decision of the supreme court of Texas holding the mortgage lien of the defendants in error superior to the rights of plaintiff in error, under the levy and sale of the property under execution, was correct for the following reasons:

A. Because the mortgagees had the right of election or selection from the herd of the number and kind covered by their mortgage.

AUTHORITIES.

23 Texas, 46.
77 Texas, 467.
91 Texas, 121.
Heywood's case, 2 Coke, 37.
Palmer's case, 5 Coke, 24.
Call *vs.* Gray, 37 N. H., 428.
Leighton *vs.* Brown, 19 Neb., 546.
Frost *vs.* Bank, 68 Wis., 234.

B. Because, the mortgage in question being valid and binding as between the original parties, it was also valid and binding as between defendants in error and plaintiffs in error, for the reason, if for no other, that a creditor purchasing property and crediting the amount of his bid on the execution is not an innocent purchaser for value.

AUTHORITIES.

87 Texas, 443.
61 Texas, 648.
67 Texas, 661.
69 Texas, 687.
32 S. W. R., 78.
29 S. W. R., 380.

C. Because the rights obtained by plaintiffs in error by virtue of the levy and sale of the cattle and horses as the property of J. H. Cooke are subordinate to the mortgage lien of the defendants in error.

AUTHORITIES.

Sales' Texas Civil Statutes provides as follows, to wit:

"Goods and chattels pledged, assigned or mortgaged as security for any debt or contract may be levied upon and sold on execution against the person making the pledge, assignment or mortgage, subject thereto, and the purchaser shall be entitled to possession when it is held by the pledgee, assignee or mortgagee on complying with the conditions of the pledge, assignment or mortgage."

D. Because the cows levied upon and sold were the separate property of the wife of J. H. Cooke, against whom the execution did not run. The plaintiffs in error therefore cannot, as to her property, urge the invalidity of the mortgage or ask that assets be marshalled.

AUTHORITIES.

1st edition, Am. and Eng. Enc. of Law, vol. 14, p. 699, and note 1.

E. Because this court will respect the law of the State of Texas as decisive in respect to any case arising with reference to chattel mortgages, as those questions are not of general commercial law, and each State has the right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity.

AUTHORITIES.

139 U. S., 266.

Counter-proposition.

I submit that the answer made to the second and third assignments of error and propositions thereunder is sufficient to dispose of assignment of error No. 3.

Counter-proposition under Fourth Assignment.

I respectfully submit that the evidence was amply sufficient to warrant the finding by the district court and the court of civil appeals that no fraud in fact existed, and it fully warranted the supreme court in failing to find fraud in law.

Counter-proposition under Fifth Assignment.

The measure of damages applied by the State courts in this case is the measure contended for by the plaintiffs in error on their appeal below, and is the correct measure in all cases where personal property is levied upon under sequestration process and replevied by defendant in the writ.

AUTHORITIES.

Article 4864, Sales' Texas Civil Statutes, provides:

"Judges and clerks of the district and county courts, and justices of the peace shall at the commencement or during the progress of any civil suit before final judgment have power to issue writs of sequestration returnable to their respective courts in the following cases. * * * 3. Where a person sues for the foreclosure of a mortgage, or the enforcement of a lien upon personal property of any description and makes oath," &c.

Article 4873 provides that—

"When property has been sequestered the defendant shall have the right to retain possession of the same by delivering to the officer executing the writ his bond payable to the plaintiff with two or more good and sufficient sureties to be approved by such officer for an amount of money not less than double the value of the property replevied."

Article 4874 provides:

"If the property to be replevied as provided in the preceding article be personal property the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill treat, injure, destroy, sell or dispose of the same according to the plaintiff's affidavit, and that he will have such property with the value of the fruits higher and revenue thereof forthcoming to abide the decision of the court, or that he will pay the value thereof, and of the fruits, hire, or revenue of the same, in case he shall be condemned so to do."

Article 4876 provides:

"The bond provided for in the three preceding articles shall be returned with the writ to the court from whence the writ was issued, and in case the suit is decided against the defendant, final judgment shall be entered against all the obligors in such bond jointly and severally for the value of the property replevied, and the value of the fruits, hire, revenue or rents thereof as the case may be."

Article 4877 provides:

"The defendant shall have the right at any time within ten days after the rendition of the judgment provided for in the preceding article to deliver to the sheriff, or constable of the court in which such judgment is rendered, the property or any portion thereof, which he has bound himself to have forthcoming to abide the decision of the court, and the sheriff or constable to whom such possession is tendered shall receive such property, &c."

In view of the right of the defendant to satisfy the judgment by return of the property, it was held in Cooke *vs.* Halsell, 65 Texas, 1, that the verdict and judgment should find the value of the several items of the property replevied.

Also in Watts *vs.* Overstreet, 78 Texas, 578, it was held:

"That the value of the property for which defendant and the sureties on his replevy bond may be liable is not the value at the time the petition or affidavit is filed, but at the time of the trial. In satisfaction of the judgment on the bond the property can be returned, and if only a part of it be returned then there shall be a credit on the judgment *pro tanto*."

To the same effect see Western Mortgage Co. *vs.* Shelton, 29 S. W. R., 494; also Hallert *vs.* San Saba, &c., 34 S. W. R., 637.

STATEMENT.

The plaintiffs in error, appellants below, assigned error in the State court as follows:

Tenth Assignment of Error.

The court below erred in rendering judgment herein against John M. Avery and his sureties on replevy bonds, Charles C. Cobb and H. I. Phillips, because the evidence as to the value of the property all fixed the value at the time the execution from the United States court was levied and

the property sold and the writs of sequestration executed, all of which was in June and July, 1893, and said evidence does not relate to the value at the time of this trial, in October, 1897, and the findings of the court as to the values are based on said evidence and fix the values on said former dates, and said evidence and findings furnish no legal basis on which to render said judgment against said John M. Avery and the sureties on his replevy bonds (Record, p. 51). The court of civil appeals, on question of value, found as follows, to wit:

"The evidence is sufficient to show the value of the property at the time of the trial, was as found by the trial court, and the value so found relates to that time, and not to the time the property was levied upon by the United States marshal, or when the writs of sequestration were issued" (Record, p. 59).

The defendants in error herein and appellees in the appellate court of Texas urged cross-assignments of error under the rules promulgated by the supreme court of Texas, all of which were sustained by the supreme court except cross-assignments of error No. 4, which the defendants in error in the nature of a cross-appeal now here assign as follows, to wit:

"The court erred in refusing to foreclose the lien of appellees, I. Popper & Bro. and R. R. Neyland & Co., on the 17 2-year-old steers and 32 2-year-old heifers, and in refusing to give appellees judgment against appellants; also for the value of said 17 head of steers and 32 head of heifers, their value being as follows, as found by the court, $534, together with 6% interest thereon" (Record, p. 92).

Proposition under Cross-assignments of Error.

The chattel mortgage executed by J. H. and M. E. Cooke to T. H. King to secure the note sued upon contained a sufficient description of the calves, being the 17 2-year-old

steers and the 32 2-year-old heifers, at the time of the trial, to entitle the defendants in error to a foreclosure of their lien as against the plaintiffs in error, the said mortgage being valid as between the original parties thereto and all those who claimed any privity with them who do not occupy a better position in law.

AUTHORITIES.

I respectfully refer the court to the authorities heretofore cited under counter-propositions, first assignment of error.

STATEMENT.

The mortgage described the property in question as follows:

"Also 50 head of cows with their spring calves, following the cows not over seven years old; cows branded Cooke on left side and O. K. on left hip and marked Swallow Fork in right ear, the over and under lid of left ear; calves to be marked and branded. All of said mules, colts, horses and mares are in pasture or at work on our farm at Payne's store, Hunt county, Texas, and all cows and calves are in pasture and are on range near Payne's store, Hunt county, Texas" (Record, p. 26).

This instrument is dated May 30, 1891.

The court of civil appeals found the value of the 17 2-year-old steers to be $12 per head, or $204, and the 32 2-year-old heifers at $10 per head, or $330, aggregating the sum of $534. The defendants in error herein pray, *first*, whether or not this court will take jurisdiction of this cost; *second*, if the court should hold that the record presents a question for its jurisdiction, then the defendants in error pray that the judgment of the supreme court of Texas be in all things affirmed, except as to that portion of its judgment wherein the court refused to sustain the fourth cross-

assignment of error, urged by the defendants in error, and in that respect the defendants in error pray of this court that judgment be rendered in their favor for the sum of $534, and 6 per cent. interest thereon in addition to the judgment rendered in their favor by the supreme court, and for such other and further relief in law or equity as they may be entitled to; and, as in duty bound, they will ever pray.

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